IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, A. D. 1944

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MARTIN KAHNER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF CASE

The facts of this case are, we believe, stated adequately in the foregoing petition for writ of certiorari.

The controlling and most important question in this case is a federal question involving the rights and liberties of a United States citizen under Article V and under the Fourteenth Amendment of the Constitution of the United States.

### ARGUMENT

We have already pointed out to this Court, in our petition for the writ of certiorari, that it has been the contention of this defendant, during the lengthy trial of the lower court and in the appeal to the Supreme Court of the State of Minnesota, that an indictment based entirely upon evidence submitted to a grand jury by a complaining witness who is insane, is illegal, void and contrary to

Article V as well as the Fourteenth Amendment of the Constitution of the United States. And it has been, and is, our further contention that when a court of justice permits such an indictment to stand, and a defendant is forced to go to trial under such an indictment, that he is being deprived of his constitutional guarantee under the Fourteenth Amendment to the Constitution of the United States, and is deprived of his rights, life and liberty without due process of law.

We have already mentioned in our petition for writ of certiorari some of the authorities upholding our contention, and in this brief we shall attempt to point out to this court a few additional authorities, both state and federal that uphold our contention.

The law seems to be very specific and very clear throughout the entire country that an indictment based entirely upon incompetent evidence is wholly invalid and should be quashed. There is statutory as well as common law in nearly every state of the union which defines the kind of evidence that may be presented for the consideration of the Grand Jury.

In our own state, Section 10622 of Mason's Minnesota Statutes, dealing with what kind of evidence should be presented to a grand jury there is the following:

> "EVIDENCE—FOR DEFENDANT — In the investigation of a charge for the purpose of indictment or presentment, the grand jury shall receive no other evidence than—
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> 1. Such as is given by witnesses produced and sworn before them; and
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> 2. Legal, documentary, or written evidence.
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> They shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary evidence, except when such evidence would

be admissible on the trial of the accused for the offense charged."

Section 9814, dealing with competency of witnesses, is in part as follows:

"Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as follows:

* * * * *

6. Persons of unsound mind; persons intoxicated at the time of their production for examination, and children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not competent witnesses."

The first five paragraphs under the above statute, dealing with what witnesses are not competent, merely refer to such matters as (1) where a husband cannot be examined for or against his wife without her consent, and vice versa, and (2) that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, etc., and (3) deals with the privileged communications of clergymen, and (4) deals with the privileged relationship between a physician and his patient, and (5) provided that a public officer shall not be allowed to disclose communications made to him in official confidence when the public interest would suffer by the disclosure, and (6), of course, is as set out above.

The courts throughout the country uniformly hold, as, of course, does our own court, that an insane person is an incompetent witness and his testimony is illegal. The above rule is modified to some extent by all the courts, who also uniformly hold that if such a person who is of unsound mind is presented as a witness in a jury or court

case, and his sanity is questioned, then in that case, it becomes the duty of the court, before allowing such witness to testify, to inquire into his condition, to ascertain whether or not he can distinguish between right and wrong; whether he can understand the value of an oath, and if after such careful inquiry the court is then of the opinion that the witness has understanding of those facts, then he may be allowed to testify, but his testimony and its credibility are questions for the jury to decide.

In connection with the above statement of law, namely: that an insane person is prima facie an incompetent person, unqualified to take an oath, we desire to call the court's attention to the situation existing in the case at bar. In the case at bar, the complaining witness, being at the time insane, was taken before the grand jury, sworn, and his testimony was then and there taken without any effort made by anyone to see whether such insane witness could even understand the value of an oath or could distinguish between right and wrong. We presume that the county attorney who produced such a witness before the grand jury will argue that he had no knowledge or information that the said Eugene Goulet, the witness, had been adjudicated insane, but, of course, that is no excuse for submitting illegal and incompetent evidence before a grand jury.

Based solely upon such testimony, the grand jury brought in its indictment against this defendant and we are now asking the court to correct the injustice done to this defendant and to quash and dismiss this indictment.

We do not believe that it should be necessary for us to quote many authorities to substantiate our position that an insane person is an incompetent person to testify and upon whose testimony an indictment should be based, and to the further proposition that only legal and com-

petent testimony should be submitted to a grand jury for the purpose of bringing in an indictment.

However, we have checked the authorities and are pleased to submit herewith a few cases that hold in accordance with the above statements of law.

Courts in guarding the rights of individuals have gone so far as to hold that an insane person cannot even make an affidavit and that an affidavit so made by an insane person has no evidentiary value at all and is wholly void.

In **Smoot on Insanity,** page 553, paragraph 607, is the following statement of the law:

> "Since the testimony under oath of an insane person cannot be received, it logically follows that such a person **can not** make a sworn statement in the **form of an affidavit.** Such a solemn act would be vain, when the affiant did not understand or appreciate what he was doing, and the value of the facts contained in it, would have little, if any, force. **Where** such an **affiant** has been adjudged insane and confined in an asylum, it has been held that **such an affidavit so made by him will be void,** unless the jurat or the officer taking the affidavit, states that the affiant has been examined as to his sanity and found competent to make the affidavit."
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> **Spittle v. Walton,** L. R. 11 Eq. 420, 40 L. J. Ch. (U. S.) 368. In re Christie J. Page (N. Y.) 242.

The same author in the above work on Insanity, on page 247, Section 306, states the law to be as follows:

> "Since the insane person is incapable of making an affidavit, as we have seen, for the reason that such disability would necessarily follow as a corralory to his disqualification as a witness, it has been held that **he may not make complaint,** as a basis for criminal prosecution. One who is without reason and discretion could not be allowed to judge the expediency of initiating so important a matter as criminal prosecution that might taint another with infamy. It is therefore held that **the complaint** and all proceedings held thereof would be void."

In the case of **Martin v. Hover,** 60 Mont. 302, 199 Pac. 694, it is held that where an incompetent person signs an affidavit, it has no evidentiary value.

Also in the case of **State v. Smith,** 26 Wash. 354, or 67 Pac. 70, the court while affirming a conviction of robbery, where the witness appeared to be in a state of mental collapse, said:

> "The record shows that on the same day the verdict of the jury was returned, the prosecuting witness was duly adjudged to be an insane person, and was duly committed to the asylum for the insane. **It is manifest therefore** that he was laboring under the same disability when he was upon the witness stand, and he was for that reason an incompetent witness. His testimony must therefore be entirely eliminated."

In the case of **Lee v. State,** 43 Tex. C. R. Rep. 285, 64 S. W. 1047, it was held that the female named in the indictment which charged the accused with rape in having had carnal knowledge of a female being so mentally diseased at the time as to have no will to oppose the act, was an incompetent witness to prove the corpus delecti of the offense charged, especially when the statute provided "that no person could testify who were in an insane condition of mind when the events happened of which they are to testify.

Again in one of the leading cases of the country, namely: **State ex rel. Yelek v. Jahlik,** 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265, Chief Justice Johnson of the Supreme Court of Kansas in dismissing a case based upon the affidavit and complaint of a lunatic said as follows:

> "Having no mind or understanding there was in fact no complaint. The arrest and prosecution of a person on the initiative of one mentally irresponsible is beyond reason * * * and since the incapacity of the complaint is conceded * * * the proceeding was null and void."

It has also been held that where evidence of a witness' insanity is introduced later in the case, the court may instruct the jury that if they found the witness to be insane, they should disregard his testimony entirely. **Bowdle v. Detroit Railway Co.,** 103 Mich. 277, 61 N. W. 529, 50 Am. St. Rep. 366.

It has been held in this connection, that the testimony of such a witness will not be received where uncorroborated. For example, it is held that the uncorroborated testimony of an idiot will not be sufficient as a basis for conviction of a crime. **People v. Desschere** (N. Y.), or 69 App. Div. 217, 74 N. Y. S. 761.

In connection with the above authority, we believe that it is well to mention and point out to the court at this time that in the case at bar, the only witness who confronted this defendant on this accusation is the complaining witness, Eugene Goulet, who, as we have already seen, was at the time he was supposed to have had some conversation with this defendant, about his leaving the state, insane, was insane at the time he testified before the grand jury and is at this moment still insane. It is upon such testimony and such testimony alone that the State in this case prosecuted this case against the defendant.

In concluding the authorities on the testimony of insane person, we desire to call the court's attention to a well written note in 28 L. R. A. 318, where we find the following statement of the law:

> "If the prosecuting witness is incompetent to testify or prosecute, the indictment will be invalid if objected to in time."

In connection with the other proposition of law, namely: the proposition that evidence before a grand jury shall be **competent and legal and only that,** we at

this time desire to call the court's attention to a few authorities on that subject:

In a well written opinion in the case of **U. S. v. Kilpatrick,** 16 Fed. 765, p. 771, Justice Dick stated the law as follows:

> "Investigations before grand juries must be made in accordance with well established rules of evidence, and they must have the best legal proof of which the case admits. In this respect **they are judicial tribunals.** The prosecuting officer is presumed to be familiar with the rules of evidence and **it is his duty to take care that no evidence is received** by the grand jury which would not be admissible in a court upon the trial of the cause. Citing Wharton Criminal Law, Sec. 493."

The author of the above note states the general rule to be as follows:

> "In accordance with the uniform rule of law, recognized by statute, that a grand jury ought to receive only competent legal evidence (and that's the rule in our state) (20 Cyc. 1346), it seems that, in some jurisdictions, while the court cannot inquire into the sufficiency of the evidence before a grand jury, **it may inquire into the legality of such evidence,** and if it is plainly illegal and incompetent, as a whole, should quash the indictment."

Now that was exactly our contention all the way through our case, both before the case was tried and after it was tried. We couldn't very strenuously quarrel with the lower court's ruling when before the trial of the case the court said that it could not go into the testimony that was presented before the grand jury, the court holding that although the testimony of Goulet was plainly incompetent, there may have been other competent testimony by other witnesses.

But, after the completion of the trial, when every witness who had appeared before the grand jury had also appeared before the lower court and testified, it was very clear to the court, that there wasn't one single word of evidence by any one of these witnesses upon which an indictment could have been based, outside of the statements of Eugene Goulet, and it is our contention, that when the lower court realized that, it should have granted the motion of defendant to quash the indictment, and our Supreme Court should have corrected the lower court's error.

In the case of **Boyce v. Territory,** 5 Okla. 61, 47 Pac. 1083, quoted by the author of the above note as one of the leading cases in the country, the court holds in the syllabus as follows:

> "Article V of the Constitution of the United States, providing that 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' does not mean an accusation in the mere form of an indictment, but does mean a presentment or indictment found and returned by a grand jury legally selected, impaneled and sworn, and upon **competent evidence** as authorized by law; and a trial of a person for such crime without an indictment thus found and returned is in violation of his constitutional right and void."

The court, on page 65, said, as follows:

> "The proceedings of grand juries cannot ordinarily be disclosed, but this rule is not to be carried to the extent of obstructing justice or creating wrong and hardship. A court may inquire into the evidence upon which a grand jury has found an indictment, and if such evidence is plainly illegal and incompetent, should quash the indictment." Citing the following cases:
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> **People v. Restenblatt,** 1 App. Pr. 268;

**Rice on Evidence,** 411 Bishop's New Criminal Procedure, Vol. 1 En. 764;
**State v. Grady,** 12 Mo. App. 361;
**U. S. v. Kirkpatrick,** 16 Fed. Rep. 765.

This Kirkpatrick case we have already quoted above. Our contention in this case is exactly as set out by the above court, namely, when the lower court heard all the evidence of other witnesses that appeared before the grand jury and found out that Goulet's testimony was the only testimony upon which an indictment could have been based, and his testimony because of his insanity being incompetent, should have quashed the indictment.

> It is very interesting to note that as early as 1855, when there was little precedent for some phases of our law, that judges very zealously guarded the rights of individuals indicted by grand juries. We believe that this Court will find very enlightening, along these lines, the case of **People v. Restenblatt,** 1 App. Pr. 268 (N. Y.), supra, decided in 1855.

The above case was also a case which came up upon motion to quash an indictment. The motion to quash in that case was based upon the sufficiency of the evidence before the Grand Jury, instead of the competency of the evidence as involved in our case. Although the grounds for quashing are different, the principles of law involved are identical.

The above New York court, after setting out the grounds for the motion to quash said, as follows:

> "And now, upon this state of facts (given preliminarily, for a better view of the case), the Court is moved to go behind the indictments and take judicial notice of this want of proof for the purpose of setting them aside; thus raising the question, both new and important, whether a criminal court can pass behind the record to learn if there was any proof before the grand inquest, going to establish the

offense alleged, with a view to quash an indictment, lawful in its composition, in accordance with the rules of pleading, and imparting absolute verity on its face. The criminal books afford almost no authority for the exercise of such a power, and I cannot find a precedent among adjudicated criminal cases either in this country or England for so bold an intrenchment of the heretofore scarcely disputed right of a grand jury to indict whom they pleased, when they pleased, how they pleased and for what they pleased, with proof or no proof as they pleased, defying the Court of which they are less than a coordinate branch against all review of their acts, however demanded by the rights of the citizen, or needed for ends of public justice; nor yet is there any decision involving a principle of law or rule of criminal procedure going to interdict such innovation when prudently resorted to for the attainment of truth and the administration of that justice which is the right of all men."

After discussing various phases of the case, the Court again said on page 271 as follows:

"It is in my judgment quite enough that a grand jury is licensed to act in secret upon exparte testimony in respect to all matters and persons, without permitting them to indict individuals contrary to the rules of law, and where no crime has been proved, as for instance, a witness testifies before the Court and jury; a spectator hears a bystander say that the evidence is corruptly false; upon this the spectator goes before the grand jury now in session and swears that the witness testified to something which he believes to be utterly false, as a citizen standing by said it was so; and upon this an indictment is ordered for perjury. Is there no relief in such a case except a public trial? Can not courts through facts appearing quash the indictment for insufficiency of proof? If not why not? The only answer is that there is no authoritative precedent. If not, it is time for one; for if controlled by nothing else, grand

juries should be bound by the rules of evidence, for upon this more than anything else, depends a citizen's safety. In the case of Dr. Dodd (& Leach C. L. 184), when the defendant was called upon to plead, he challenged the validity of the indictment upon the ground that it was found upon the testimony of incompetent witnesses. The Court entertained the objection. The matter was argued by some of the most able lawyers at the English bar before the twelve judges, and it was only because that they decided that the evidence was legal and the witnesses competent that the objection failed."

The Court in the above New York cases, after quoting further principles of law then ordered the indictment to be quashed.

Another well written opinion dealing with the rights of courts to scrutinize indictments brought in by grand jurors, and if possible to prevent miscarriage of justice, is the case of **State v. Grady, supra,** where the learned Missouri court said on page 363:

"The common law rule of secrecy was formerly enforced with a strictness wholly unknown to the more recent adjudications. It was long held that no one should be heard, under any circumstances to impeach or impugn the propriety or regularity of a grand jury's proceedings. **United States v. Brown,** 1 Sawyer 531. But the later which recognizes **personal constitutional rights, as superior to every other consideration,** is now well established, that whenever it becomes essential to the ends of justice, or to constitutional supremacy, to ascertain what has occurred before a grand jury, it may be shown, no matter by whom, the only limitation being that it may not be shown how the individual jurors voted, or what they said during their investigations (quoting the following cases)":

**Burdick v. Hunt,** 43 Ind. 381;

**Sikes v. Dunbar,** 2 Wheat. Sel. N. P. 1091;

**Hindelkoper v. Cotton,** 3 Watts 56;
**Thomas v. The Commonwealth,** 2 Rob (Va.) 795;
**The State v. Fasset,** 16 Conn. 457;
**The Commonwealth v. Hill,** 11 Cush. 137;
**The State v. Broughton,** 7 Ired. 96;
**Way v. Butterworth,** 106 Mass. 75;
**The People v. Shattuck,** 6 Abbott N. C. 34;
**The Commonwealth v. Mead,** 12 Gray 167.

The judgment in this case was properly reversed.

In the case of **People v. Acritelli,** 57 Misc. 574, 110 N. Y. Sup. 430, which is a lengthy and well written decision on a motion to quash an indictment and which motion was quashed, the court said, beginning on page 597 as follows:

> "An indictment may, moreover, be set aside because of the reception by the grand jury of **illegal** or incompetent testimony.
>
> "The statute provided (as does our statute) that the grand jury can receive none but legal evidence. Code Criminal Law. Pro. § 256. (See our statute 10622.) While in the absence of proof to the contrary, the presumption is in favor of the legality of the proceeding of a grand jury, where the minutes of the testimony taken before the grand jury are before the court, as in the case on this motion, the motion is to be determined on such evidence and not on presumptions. The section referred to in effect requires that investigations before grand juries shall be made in accordance with the established rules of evidence and that the evidence received shall be **competent legal** evidence, namely, such as is legitimate and proper before a trial jury. Although this section, as well as some others in its immediate context is primarily intended as a rule for the guidance of the grand jurors, for the conscious violation of which they can perhaps be at least admonished by the court, its secondary and

> more useful purpose is to safeguard the **inherent** and constitutional rights of the citizen in his contact with judicial proceedings. As so considered, it declares a rule for the violation of which his injury an individual, under certain circumstances, may obtain redress. This redress is afforded by granting a motion to dismiss an indictment when it appears to the court by competent evidence that the indictment is founded solely upon illegal evidence or to such an extent upon illegal evidence as to indicate that the indictment resulted from prejudice or was found in wilful disregard of the rights of the accused."

In line with the above authorities, we desire to call the court's attention to the leading Minnesota case on the question of competency of evidence before a grand jury upon which an indictment may be based, namely: the case of **State v. Marshall,** 140 Minn. 363, 168 N. W. 174.

The above Minnesota case holds squarely with the proposition that we have been contending for throughout this case that our motion to quash the indictment should have been granted because it was based entirely on the incompetent evidence of the complaining witness, Eugene Goulet, who at the time that he testified before the grand jury, was duly adjudicated insane and therefore was incompetent.

In dealing with the nature and kind of evidence that a grand jury may hear for the purpose of bringing in an indictment our court in the above case, first paragraph on page 365 said:

> "A grand jury in the investigation of a charge for the purpose of indictment or presentment can receive none but legal evidence. G. S. 1913-1917."

In the above case, it appears that in a prosecution for adultery, the husband, without the consent of the wife, was one of the witnesses before the grand jury, who

brought in the indictment. The court held that such testimony was incompetent, but held further that there was other competent testimony before the grand jury upon which this indictment might have been based, and laid down the general rule which is in accord with the weight of authority throughout the country, that an indictment based **partly** on incompetent evidence is invalid and cannot be quashed upon motion. Here our court quotes with approval the well written note in the case of **Noll v. Dull,** 47 L. R. A. (N.S.) 1207, and cases cited therein.

But in the case at bar it is the contention of the defendant that this indictment is not based on only **part incompetent** testimony, but is based **entirely** on the incompetent testimony of the insane witness Eugene Goulet. As we have already pointed out above, when we analyzed the testimony of each and every witness who appeared before the grand jury, there wasn't **one single witness** who knew anything about any act of defendant Kahner in this case that might lead to an indictment, and it is just as clear as it can be that the indictment against the defendant was based solely upon the testimony of the insane witness Eugene Goulet.

Our Supreme Court in the above Marshall case realized the possibility that an indictment could some time be based **entirely** on incompetent evidence before a grand jury—just as we are contending here—and intimated in very emphatic language that an indictment so brought about would be invalid.

At the bottom of page 365 our court said as follows:

> "It does not appear in the case at bar that there was not ample evidence outside of that of the husband to warrant the indictment. It only appears that he was one of several witnesses examined, and from the form of the question reported to us, that the indictment was based in part upon his testimony."

In other words, our court intimated very clearly, in the above quotation that had it appeared in the above case that there wasn't ample other evidence outside of that of the husband, that the indictment would have been invalid.

In our case that is exactly what we are contending and we believe that we have proved, beyond a shadow of a doubt, by analyzing the testimony of every witness who appeared before the grand jury and as given at the trial, that the indictment was based solely on the testimony of the witness, Eugene Goulet, and could not under any circumstance be based upon even **one** word of other testimony. Therefore, under the rule of the **Marshall case, supra,** we believe that upon the conclusion of our case in the lower court, when it was pointed out to the court that this indictment could not have been based upon any other testimony except that of Eugene Goulet, the insane witness, the court should have quashed the indictment and when this matter came before our Supreme Court, this Court should have met this issue squarely, instead of evading it, and should have reversed the lower court.

Our Supreme Court in the above **Marshall** case realizing that at some time or other it could be confronted with the proposition where an indictment might be based solely upon incompetent evidence, left that question open, when it said on page 366:

> "We decide only the question before us, and not what would be the law in some other situation."

We believe now that we had before our Supreme Court in the case at bar the "other situation" that our court mentioned above, namely the proposition of an indictment brought in by the grand jury based entirely upon **incompetent** evidence. Under the authority of the above

case, we believe that the lower court should have quashed the indictment, and in not doing so it was in error and the Supreme Court should have corrected that error.

## CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the writ of certiorari to review the final judgment herein of the Supreme Court of the State of Minnesota in the above entitled action.

Respectfully submitted,

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